United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1462
76-7560

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs-Appellants,

-against-

LOUIS L. LEVINE, individually and as Industrial Commissioner of the State of New York,

Defendant-Appellee.

DEFENDANT-APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
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DEFENDANT-APPELLEE'S BRIEF

Preliminary Statement

This is a consolidation of two appeals by the plaintiffs-appellants from two judgments of Judge Robert L. Carter in the Southern District of New York, which dismissed the same complaint. The first appeal was taken by notice of appeal dated August 4, 1975 (Docket No. 75-7462) from an

order and decision dated July 24, 1975 dismissing the complaint (Expert Electric, Inc., et al. v. Levine, 399 F. Supp. 893) (A. 5; A. 7-23).

The second appeal, docketed in this Court as No. 76-7560, is from an order and memorandum decision # 45343, dated November 5, 1976 which also dismissed the complaint.

In plaintiffs-appellants' motion, to which defendant-appellee consented, the aforesaid appeals were consolidated by order of this Court dated December 8, 1976.

Questions Presented

1. Were plaintiffs deprived of procedural due process because they were not named as individual parties to the deregistration proceeding, where they were represented by their association and received actual and constructive notice of the proposed deregistration?

2. Were plaintiffs deprived of due process because they have been held responsible for acts of an association in which they are all members and a J.A.C. in which they are participating employers?

3. Were plaintiffs denied equal protection of the laws because their program was deregistered while no similar action has been taken as yet against a competitor's program which is allegedly responsible for similar violations of Article 23?

4. Is a state court decision on the merits res judicata herein of question 2 and 3 above where the defendant is the same and plaintiffs' interests were the same and were represented in State Court by two parties having authority to represent such interests?

Statutes and Regulations Involved

Labor Law

Article 23 - Apprenticeship Training

Labor Law § 810. Statement of public policy

> "Skilled manpower constitutes a great resource in this state. Apprenticeship programs, through supervised training and education, develop skilled craftsmen and help meet the increasing needs for such workers in the state's labor force. The continuing development of skilled manpower is essential for individual self-realization and for an expanding industrial economy. To these ends, it is the declared public policy of the state of New York to develop sound apprenticeship training standards and to encourage industry and labor to institute training programs. Added L. 1961, c. 482, § 2, eff. Oct. 1, 1961."

"§ 811. Powers and duties of industrial commissioner; personnel

"1. The industrial commissioner shall have the following powers and duties:

* * *

"(b) to establish suggested standards for apprenticeship agreements in conformity with the provisions of this article;

"(c) to supervise the execution of apprenticeship agreements and maintenance of standards;

"(d) to register approved apprenticeship agreements, and upon performance thereof, to issue certificates of completion of apprenticeship;

* * *

"(f) to terminate or cancel any apprenticeship agreements in accordance with the provisions of such agreements;

* * *

"(j) to adopt such rules and regulations as may be necessary for the effective administration of the purposes and provisions of this article;

"(k) to perform such other duties as may be necessary to give full effect to the policies of the state and the provisions of this article.

* * *"

Labor Law § 815

"§ 815. Suggested standards for apprenticeship agreements

Suggested standards for apprenticeship agreements are as follows:

* * *

"3. A statement of the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction which instruction shall be not less than one hundred forty-four hours per year when available, such availability to be determined by the commissioner of education.

* * *

"6. A statement of the progressively increasing scale of wages to be paid the apprentice."

New York Code of Rules and Regulations - Title 12 Labor

"601.7 Voluntary and formal deregistration of registered programs. Deregistration of a program may be effected by (a) the voluntary action of the registrant requesting, in writing, the cancellation of the registration, or (b) by the commissioner instituting formal deregistration proceedings in accordance with the provisions of this Part.

* * *

"(b) Formal deregistration. The commissioner may deregister any apprenticeship training program if he finds that the registrant, sponsor, or any participating sponsor has:

* * *

"(3) Not conducted, operated, and administered the program in accordance with the intent of article 23, or the registered provisions, or the requirements of this Part,* * *

* * *

"(c) Procedure for formal deregistration.

"(1) Where it appears that sufficient cause exists for deregistration, the commissioner shall send a notice to the registrant by registered or certified mail, return receipt requested, stating the following:

(i) The notice is sent pursuant to this section;

(ii) The ground or grounds on which it is proposed to deregister the apprenticeship training program; and

(iii) That the program will be deregistered unless, with 10 calendar days of the receipt of this notice, the registrant files with the commissioner a written request for a hearing.

"(2) If the registrant requests a hearing, the commissioner shall convene a hearing and issue his determination in accordance with section 601.9 of this Part.

"(3) In such determination, the commissioner may allow the registrant a reasonable time to achieve voluntary corrective action.

"(4) In each case in which deregistration is ordered, the commissioner shall publish promptly in newspapers of general circulation a notice of the order and shall notify the registrant. In addition, the commissioner shall promptly notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of his individual registration; and that the deregistration removes the apprentice from coverage for State purposes."

New York Code of Rules and Regulations - Title 12 Labor

> "601.8 Reinstatement of program registration. Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed three years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period."

Counterstatement of Facts

Plaintiffs-appellants, all members of United Construction Contractors Association, Inc. ("United"), by order to show cause commenced this action to enjoin the defendant-appellee Industrial Commissioner of New York State from cancelling the registration of apprentice electricians employed by plaintiffs-appellants and from disqualifying each plaintiff from employing apprentices registered under the cancelled program for a period not to exceed three years (A. 31-33, 35).

Appellants' association United is a New York membership corporation which conducts collective bargaining negotiations and enters into collective bargaining agreements on behalf of its members with Local 363, International Brotherhood of Teamsters (hereinafter referred to as Local 363). Local 363 is comprised of journeymen and apprentice electricians (A. 31).

United and Local 363 formed a Joint Apprenticeship Committee (hereinafter referred to as J.A.C.) to sponsor an apprenticeship training program pursuant to the provisions of Article 23 of the New York Labor Law (A. 31). Pursuant to §§ 811(1)(d) and 220(3)(e) of the Labor Law a Master Agreement was filed with the Department of Labor in December, 1971 (A. 31). Under the terms of the Master Agreement and Labor Law §§ 811, 812 and 815, the sponsors and participating employers including these plaintiffs-appellants were to provide the registered apprentices with on the job training in the processes of the electrician's trade according to a schedule of work processes contained in the Master Agreement. The apprentices were also to receive 144 hours of related and supplemental classroom instruction (A. 47, 48; Labor Law § 815). This Master Agreement also set forth a schedule of wages to be paid to journeymen and apprentices. The Master Agreement also set forth the ratio of apprentices to journeymen which are to be used on a job (A. 47, 48).

After the Department of Labor received a complaint that the sponsors United, Local 363 and J.A.C. were violating the terms of the apprenticeship training agreement (Master

Agreement) and after appellee met with the sponsors' representatives concerning the alleged violations, and after an investigation was conducted by the Department of Labor, on June 17, 1974, the Industrial Commissioner pursuant to § 601.7(c) of the Regulations governing the Registration of Apprenticeship Programs and Agreements, served the sponsors with notice of a proposed deregistration on the ground that sponsors had failed to provide the training for apprentices as required by the apprenticeship agreement, that participating employers in the program had failed to pay mandated wages or used apprentices in excess of the prescribed ratio and that the sponsors had failed to correct the deficiencies although they had been aware of them since June, 1973 (A. 41-44).

While the individual participating employers were not named parties in the aforesaid notice, the Department of Labor mailed a copy of the notice of proposed deregistration to each participating employer including these plaintiffs-appellants (A. 64).

Thereafter, upon the request of the program sponsors, United, J.A.C. and Local 363, five hearings were held and the above three respondents were represented by counsel.

United, of which each of these plaintiffs-appellants is a member, was represented by George Turchin, Esq., and Morris Weisberg, Esq. represented the J.A.C. of United (A. 47).

After reviewing the transcript of testimony and the exhibits presented at the hearing the Industrial Commissioner, following the recommendations of the seven member panel, concluded that the apprenticeship training program should be deregistered (A. 46-54). Pursuant to 12 NYCRR 601.7(c)(4), 601.8, the Commissioner cancelled the registration of apprentice electricians employed by the participating employers including these plaintiffs-appellants, and, for a period not to exceed three years, disqualified them from employing registered apprentices and from registering any apprenticeship agreement or training program in their individual names as employers.

Thereafter, this action was commenced May 22, 1975 in the District Court for the Southern District by these twelve participating employers as plaintiffs by an order to show cause, to enjoin the Industrial Commissioner from carrying out the cancellation of the program.

Despite the fact that each plaintiff was a participating employer and concededly a member of United, and that upon the face of the complaint United was served and was represented at the hearing resulting in the deregistration order issued by the Industrial Commissioner, these plaintiffs now alleged, in substance, that they were denied due process because the statute did not provide for notice and service to them individually, rather than in their capacity as members of United and as participating sponsors of J.A.C. (A. 31-36). Plaintiffs also contended that they suffered invidious discrimination which constituted a denial of equal protection because only their sponsor and not some other allegedly responsible for similar violations was subjected to deregistration (A. 37-38).

The plaintiffs sought to enjoin the Commissioner from deregistering the program upon the ground that the statute and procedures thereunder, particularly those relating to notice, are unconstitutional, deprive them of civil rights and will allegedly result in irreparable harm because they will not be able to bid competitively on public contracts since they will not be permitted to pay apprentice wages but will have to pay all workers full mechanics wages since they no longer have State registered apprentices (A. 34, 39).

The District Court Decision

The District Court per Judge Robert Carter rejected plaintiffs' contention that they could not be held legally responsible for acts by United, J.A.C., Local 363 or by any other employers which violated the Master Agreement or the standards of Article 23:

> "Plaintiffs have not alleged that they unwittingly became participating employers, or were forced to employ apprenticeship labor at lower wages. In fact, the regulations explicitly provide that no apprenticeship program or agreement shall be eligible for registration unless the Commissioner finds that '. . . in the case of a Joint Apprenticeship Committee the participating employers have agreed to register all of the apprentices in their employ.' 12 NYCRR 601.4(a)(4). By voluntarily participating plaintiffs agreed to the terms and regulations of Article 23, including 12 NYCRR 601.8; supra, n. 2. Plaintiffs cannot have it both ways. It is fundamentally disingenuous for these plaintiffs, who have reaped the benefits of the apprenticeship program, now to argue that they are free from the statutory and regulatory commitments and restrictions which the Master Agreement bound the participants to observe and from the consequences of failing to do so." 399 F. Supp. 893, 897 (1975)(A. 14-16)

The Court also rejected plaintiffs' contention that they were denied procedural due process since the notice of proposed deregistration did not name them individually.

Also rejecting plaintiffs' claim that they had been denied equal protection of the law, the District Court dismissed the complaint by its decision of July 24, 1975.

While the action challenging the Commissioner's deregistration order was pending before Judge Carter, on July 2, 1975, United and J.A.C. commenced a proceeding against the Industrial Commissioner under Article 78 of the New York Civil Practice Law and Rules for judicial review of the Commissioner's administrative determination which resulted in the deregistration (A. 79-91).

Plaintiffs herein then filed a notice of appeal dated August 4, 1975, from Judge Carter's decision and order and docketed the appeal as No. 75-7462. Thereafter, plaintiffs moved in this Court pursuant to Rule 60(b) of the F.R.C.P. for an order granting leave to plaintiffs to make a motion in the District Court to vacate the District Court's order and judgment dismissing the complaint on the ground of mistake by plaintiffs'

attorney, and to grant a rehearing of plaintiffs' motion for a preliminary injunction with an opportunity for plaintiffs to present evidence which they claimed they had mistakenly declined to do at the first hearing. This Court granted such leave by order dated September 2, 1975 and Judge Carter granted the motion for a rehearing on November 6, 1975.

At the rehearing, the Court heard oral argument then directed a stay of proceedings in the action in light of a stay of the Commissioner's order which had been issued by the Appellate Division and in view of the fact that argument in the State court case was to be heard within a week.

Thereafter, the Appellate Division on June 2, 1976, confirmed the Industrial Commissioner's administrative determination deregistering the apprentice training agreement of United, Local 363 and J.A.C., the Court of Appeals of the State of New York denied leave to appeal on July 16, 1976.

On June 29, 1976 the Industrial Commissioner also defendant herein renewed his motion to dismiss or in the alternative for summary judgment upon the ground, inter alia, that the Appellate Division's decision in United Construction Contractors

v. Levine, 52 A D 2d 371 (A. 76-78) was res judicata in the instant case in that the same operative matters of fact and law presented by the complaint herein were adjudicated in a suit between the authorized representatives of these plaintiffs and the same defendant, the Industrial Commissioner.

For a second time, the District Court dismissed the complaint (A. 27-29). The plaintiffs by notice of appeal dated November 15, 1976 appealed from that decision and docketed the appeal as No. 76-7560. This Court ordered both appeals consolidated by an order dated December 8, 1976.

POINT I

PLAINTIFFS HAVE NOT BEEN DENIED DUE PROCESS SINCE THEY RECEIVED NOTICE AND WERE REPRESENTED AT THE HEARINGS IN THEIR CAPACITY AS MEMBERS OF THE UNITED CONTRACTORS ASSOCIATION, AND AS EMPLOYER PARTICIPANTS IN THE J.A.C.

It appears from the face of the complaint that plaintiffs herein are all members of the United Construction Contractors Association ("United") which they admit acts as their representative and agent with respect to collective bargaining agreements they enter into with Local 363 and are bound by them. Yet

they assert here, in effect, that "United" does not represent them and commit them with regard to the apprentice training program of which they are participating employers, since their claimed denial of due process is grounded upon an alleged lack of notice and lack of opportunity to be heard respecting the lengthy hearings had before the New York State Department of Labor which resulted in the Commissioner's order deregistering the apprentice program. This contention is totally without merit.

The sponsor of the program which was deregistered was J.A.C. As it appears from the complaint, J.A.C. was formed by United and Local 363. With respect to matters concerning selection and registration of apprentices the J.A.C. acts for employers and this is reflected and effected by the collective bargaining agreement and is further reflected by the Master Agreement (A. 47-48) which is signed for the employers, including all these plaintiffs by Mr. Alan Picault, Chairman of J.A.C. and an officer of United. It was by virtue of this Master Agreement that these plaintiffs as participating employers registered and had the benefit of apprentice labor and were permitted to pay apprentice wages to their employees registered thereunder. That right was derived by the employers in return for their commitment to live up to their responsibilities to provide training and supervision, to

evaluate the apprentices progress and to keep appropriate records (Paragraph 6 of the Master Agreement). It was through the J.A.C. and Mr. Picault's signature on the Master Agreement that they derived the benefits they are now complaining have been denied to them without due process (See § 601.4[a][4] of the Regulations governing the Registration of Apprenticeship Programs and Agreements).

The crux of plaintiffs' claims, particularly in their first and third claims for relief, is contained in so much of paragraphs 18 and 19 (A. 34-35) of the complaint as assert that plaintiffs were not served with notice of proposed deregistration, and that "no plaintiff was a party to the said proceeding, or had any notice thereof or any opportunity to be heard with relation thereto, or to present evidence and to cross-examine witnesses at a hearing relating thereto; and the defendant's aforesaid determination did not refer to any of the plaintiffs or make any determination concerning them" (Complaint, paragraph 18). But this claim is without merit in law or in fact.

The affidavit of Abraham E. Klein, Esq. (A. 64-66) shows that the notice of proposed deregistration was mailed to every contractor who was a member of United, including all these plaintiffs. But more importantly, the sponsor, United and

Local 363, J.A.C. was served with said notice by service upon Mr. Alan Picault, Chairman of J.A.C. and the employer representative who bound the employers including these to the Master Agreement when he signed that agreement. Moreover, Mr. Picault was also served at the offices of United in his capacity as an officer of the corporation. After this notice was served the sponsor requested a hearing. Hearings were in fact held on five separate dates between October, 1974 and March, 1975 at which times these plaintiffs as members of United were represented by N. George Turchin, Esq., and as participants in J.A.C. were represented by Morris Weisberg, Esq., attorney for J.A.C.

In a host of cases involving employment in the construction industry employers had had interests substantially affected through their membership in contractors associations or participation in J.A.C.'s with service upon such associations or J.A.C.'s sufficiency for purposes of notice, jurisdiction, and the granting of relief binding on employers.

United States v. Local 638, Mechanical Contractors Association and the Steamfitting Industry's Joint Apprenticeship Committee, et al., 360 F. Supp. 979 (S.D.N.Y. 1973); 501 F. 2d 622 (2d Cir. 1974), e.g. was one part of a larger action brought

by the Attorney General in which the defendants were four local unions in the building trades and their counterpart Joint Apprenticeship Committees and employer associations (See United States v. Local 638, Enterprise Ass'n., etc., 347 F. Supp. 169 (1972).

It is well-settled that notice as a requirement of due process in a proceeding which is to be accorded finality is such notice reasonably calculated under all the circumstances to apprise the interested parties of pendency of the action and afford them an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Bank of Marin v. England, 385 U.S. 99 (1966); Armstrong v. Texas, 380 U.S. 545 (1965). In the instant case it is clear that service of the notice upon United and upon J.A.C., with a copy mailed to each employer contractor including these plaintiffs constitutes "notice reasonably calculated under all circumstances to apprise interested parties" especially where, as is the case here, the proceeding was something less than an action against these plaintiffs individually, and their agents and representatives had notice and did participate in the hearings.

As Judge Carter noted in the decision below:

> "As noted earlier, insofar as the apprenticeship program was concerned, both United and JAC represented the interests of participating employers. Cf. United States v. Local 638, Enterprise Association of Steam, 360 F. Supp. 979, 995 (S.D.N.Y. 1973), modified on other grounds, 501 F. 2d 622 (2d Cir. 1974). The notice of proposed deregistration was served on both United and JAC; additionally all plaintiffs received copies of that notice on the same day. A hearing was requested, notice of the hearing was sent to United and JAC, and both entities were represented there by counsel; in fact, the same counsel represent plaintiffs in this action. One of the plaintiffs in this action, Eugene Iovine, Inc. appeared and testified at one of the hearings. Plaintiffs, then, as members of United and as participating employers in the JAC, received actual and constructive notice of the proposed deregistration, and were not denied any opportunity to be heard." 399 F. Supp. 898 (A. 18-19)

In sum the plaintiffs herein suffered no actual harm from the notice provisions of the labor department's regulations, whose constitutionality they are challenging, and the actual operation of the procedures of the department of labor and therefore they consequently lack standing to challenge those provisions and procedures. Rollins v. Shannon, 292 F. Supp. 580 (D.C. Mo. 1968).

POINT II

PLAINTIFFS WERE PROPERLY HELD LEGALLY RESPONSIBLE FOR ACTS OF THEIR AUTHORIZED AGENTS, UNITED, J.A.C. AND OTHER PARTICIPATING EMPLOYERS, SINCE THEY WERE AWARE, OR SHOULD HAVE BEEN AWARE OF THE LONG HISTORY OF MASSIVE VIOLATIONS AND MADE NO EFFORT TO DISSOCIATE THEMSELVES FROM SUCH VIOLATIONS AND FAILED TO TAKE EFFECTIVE MEASURES TO CORRECT THEM.

The plaintiffs-appellants were all members of United. They were all participating employers in the J.A.C. formed between United and Teamsters Local 363. When United signed the Master Agreement, it did so on behalf of all these plaintiffs. The plaintiffs derived benefits of the apprenticeship training program only by virtue of their membership in United and the J.A.C. not through any property right or entitlement which they possessed as individual employers.

This Master Agreement committed these plaintiffs as participating employers, or the J.A.C. as agent for the employers, to evaluate periodically the apprentice's progress in job performance and in related classroom instruction and to maintain appropriate records. These undertakings by the participating employers constitute a prerequisite of registration. See 12 NYCRR 601.5(c)(6). Indeed, the program or agreement would not

have been eligible for registration unless the Commissioner could find that "in the case of a Joint Apprenticeship Committee the participating employers have agreed to register all of the apprentices in their employ." 12 NYCRR 601.4(a)(4). By voluntarily agreeing to participate in the program the participating employers, including these plaintiffs-appellants, agreed to be bound by the terms and regulations of Article 23, including 12 NYCRR 601.8 which now attacks herein. As Judge Carter said in his decision below:

> "Plaintiffs cannot have it both ways. It is fundamentally disingenuous for these plaintiffs, who have reaped the benefits of the apprenticeship program, now to argue that they are free from the statutory and regulatory commitments and restrictions which the Master Agreement bound the participants to observe and from the consequences of failing to do so." 399 F. Supp. 393, 397 (1975)

Yet in their complaint below, plaintiffs alleged that they did not ratify any of the acts alleged in the notice of deregistration (Complaint, p. 17, A. 34) and that their mere membership in the association should not have rendered them subject to sanctions for acts of the association or other participating employers.

But in Phelps Dodge Refining Corp. v. F.T.C., 139 F. 2d 393, 396-397 (2d Cir. 1943), this Court stated, regarding the liability of members for acts of their association:

> "Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his failure to disassociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put."

In the instant case, as Judge Carter found, every participating employer was an integral part of the sponsor with responsibility to see to it that its apprentices are trained in accordance with the terms of the Master Agreement. How could they have been unaware of the massive, long term violations which the hearing panel found and the Commissioner endorsed? Not one of 574 apprentices (including the apprentices of these plaintiffs) achieved completion of the training program, not one was certified as a journeyman, and not one completed 144 hours of required related instruction. All this should have

put each participating employer upon inquiry notice that the sponsor and participating employers were not living up to their obligations under the program. Phelps Dodge Refining Corp. v. F.T.C., supra, 139 F. 2d 396. Plaintiffs' failure to dissociate themselves from the sponsor thus constitutes a ratification of the acts found to warrant deregistration.

POINT II.

PLAINTIFFS HAVE NOT BEEN DENIED EQUAL PROTECTION OF THE LAW.

Plaintiffs assert that they have been denied equal protection of the law because the apprenticeship training program of United, Local 363, J.A.C. has been deregistered by defendant while no similar corrective action has been applied to Local 3, whose apprenticeship training program allegedly produced complaints of similar violations. This proposition is specious and without foundation.

Assuming arguendo the truth of the facts alleged with regard to Local 3's program, the selective application of deregistration by defendants does not even remotely constitute the kind of suspect classification that works as invidious

discrimination in violation of the Equal Protection Clause. Frontiero v. Richardson, 411 U.S. 677 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Company, 348 U.S. 483 (1955). Nor must the State Department of Labor, when confronted with a regulatory problem like the one in this case, "choose between attacking every aspect of [the] problem or not attacking the problem at all. . .It is enough that the State's action be rationally based and free from invidious discrimination." Dandridge v. Williams, 397 U.S. 471, 487 (1970).

POINT IV

THE DOCTRINE OF RES JUDICATA AND THE CONSTITUTIONAL REQUIREMENT OF FULL FAITH AND CREDIT BAR A SUBSEQUENT SUIT IN FEDERAL DISTRICT COURT BY PLAINTIFFS WHOSE CLAIMS, STATE AND FEDERAL, WERE FULLY ADJUDICATED IN A PRIOR STATE COURT PROCEEDING.

The membership of all plaintiffs herein in the United Construction Contracting Association is such as to bind them by the result rendered by the Appellate Division, Third Department, of the New York State Supreme Court in the proceeding; Matter of United Construction Contracting Association, et al. v. Louis L. Levine, as Industrial Commissioner (A. 76-78). Indeed, the District Court held in its opinion of July 24, 1975 dismissing the complaint on the law, that plaintiffs are legally connected

with United in respect to all matters pertaining to the apprenticeship training program and its registration. This holding is the law of the case, in no way affected by the court's later decision to grant plaintiffs a rehearing for the purpose of presenting evidence.

In considering whether res judicata can be applied to the plaintiffs, it need only be examined whether the state court judgment binds these plaintiffs to the result. It cannot be doubted that it does, for that is what these plaintiffs are here complaining about -- that the deregistration of the program adversely affects their interests. Nor can it be doubted that with respect to the proceeding before the State Industrial Commissioner and the State Supreme Court, Appellate Division, these plaintiffs had their interests represented by United which was a party of record. This is the essence of this Court's rejection of plaintiffs' due process contention as without merit. Since each plaintiff contractor had his interest represented by one having authority to represent him (United), each is bound by the judgment rendered in the state court, even though they were not formally parties in the state court proceeding. Kersh Lake District v. Johnson, 309 U.S. 485 (1940); Chicago, Rock Island

& Pacific Railway Co. v. Schendel, 270 U.S. 611 (1926); Ma Chuck Moon v. Dulles, 237 F. 2d 241 (9th Cir. 1956), cert. denied 352 U.S. 1002 (1957); Battle v. Cherry, 339 F. Supp. 186, 192 (N.D. Ga. 1972).

Turning now to a consideration of what issues and claims are precluded from relitigation in the federal forum, an examination of the issues voluntarily submitted to the state court shows clearly that substantially the same federal constitutional claims were raised and determined. The verified petition in United Construction Contracting Association, et al. v. Louis L. Levine (A. 79-91) in paragraph 11 (A. 82-83) explicitly raises contentions that petitioners were "deprived of their liberty and property without due process of law, and denied. . . equal protection of the laws, contrary to. . .Article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States. . ." Again in paragraph 29 of the state petition (A. 89, 90) federal constitutional claims are raised identical to those raised in paragraph 27 of the complaint herein (A. 37, 38).

It should be noted moreover, that the cause of action in the state court has such a measure of identity with the cause of action before the District Court that the state court judgment is conclusive not only on the questions actually contested and determined, but on all matters which might have been litigated and decided in that suit. Heiser v. Woodruff, 327 U.S. 726 (1946); Grubb v. Public Utilities Commission of Ohio, et al., 281 U.S. 470, 479 (1930); Saylor v. Lindsley, 391 F. 2d 965 (2d Cir. 1968); Buchanan v. General Motors Corp., 158 F. 2d 728 (2d Cir. 1947). It is clear that United, representing each of its members with respect to the Commissioner's determination and deregistration could have raised each and every claim later raised by its individual members in the federal district court.

It is well recognized that state court judgments are entitled to the same res judicata effect in federal courts as in state courts, Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4 (1940); St. John v. Wisconsin Employment Relations Board, 340 U.S. 411 (1951), and this principle is applicable to decisions involving federal constitutional questions as well as issues of state law. Gart v. Cole, 166 F. Supp. 129 (S.D.N.Y. 1958), affd. 263 F. 2d 244 (2d Cir. 1959), cert.

denied 359 U.S. 978; Camacho v. Rogers, 199 F. Supp. 155 (three-judge court) (S.D.N.Y. 1961); Olson v. Board of Education of Union Free School District No. 12, Malverne, New York, 250 F. Supp. 1000 (E.D.N.Y. 1966).

Moreover, it is also well settled that state courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts. Deane Hill Country Club, Inc. v. City of Knoxville, 379 F. 2d 323, 325 (6th Cir. 1967); Brown v. Chastain, 416 F. 2d 1012, 1014 (5th Cir. 1969).

Even if the State Supreme Court, Appellate Division decided United's constitutional questions erroneously, it would still be a valid judgment binding on the District Court. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). If United and its member contractors, including those contractors who are plaintiffs-appellants herein, are dissatisfied with the result of the state legislation, they should have pursued their remedy by means of a timely appellate proceeding to the State Court of Appeals and ultimately the United States Supreme Court.

Apart from the application of the doctrine of res judicata, the decision of the New York State Supreme Court, Appellate Division, is entitled to full faith and credit by this Court under 28 U.S.C. § 1738. By the enactment of § 1738 (formerly 687 of the same title) the full faith and credit provision of U.S.C. Const. Art. 4, § 1 was extended to federal courts as well as state courts. Davis v. Davis, 305 U.S. 32 (1938). The concept of full faith and credit was made applicable where, as in the instant case, a prior suit has been in a state court and a subsequent suit is in federal court. Williams v. Murdock, 330 F. 2d 745 (3rd Cir. 1964); Haydu v. City of Billings, 285 F. Supp. 785 (D.C. Mont. 1966). The effect of the doctrine of full faith and credit is similar to that of res judicata. Batiste v. Furnco Const. Co., 350 F. Supp. 10 (D.C. Ill. 1972); Olsen v. Board of Ed. of Union Free School Dist. No. 12, Malverne, N.Y., 250 F. Supp. 1000, appeal dismissed 367 F. 2d 585 (2d Cir. 1966).

The full faith and credit clause of U.S.C. Const. Art. 4, § 1 and 28 U.S.C. § 1738 require that a federal district court accord a New York State judgment asserted as a bar to

maintenance of a subsequent action in the district court the same force and effect that it would have in the courts of New York. Boothe v. Baker Industries Inc., 262 F. Supp. 168 (D.C. Del. 1966); Olsen v. Board of Ed. of Union Free School Dist. No. 12, Malverne, N.Y., 250 F. Supp. 1000.

The plaintiffs-appellants cite three United States Supreme Court cases, Stein v. New York, 346 U.S. 156 (1952); Niemotko v. Maryland, 340 U.S. 268 (1950), and Ker v. California, 374 U.S. 23 (1962) in support of their position that the decision of the New York State Supreme Court in United Construction Contractors Association Inc. v. Levine is not binding on this Court. These cases are clearly distinguishable from the case at bar. The issue here is whether or not a lower federal court should have res judicata effect to state court decisions of federal constitutional claims. The cases cited by the plaintiffs all involve the scope of review of the United States Supreme Court and whether that Court can examine de novo the essential facts which give rise to a federal claim. The plaintiffs in the cited cases all pursued the prescribed appellate route, whereas the plaintiffs in the case at bar seek to re-litigate federal claims already decided by the state court without having first sought review in the United States Supreme Court. There is no authority

in the cited cases for the proposition that the lower federal courts can assert jurisdiction to directly review final determinations of federal constitutional questions which have been presented to and decided by state courts. Indeed the weight of authority is to the contrary.

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state court to decide them and their decision, whether right or wrong was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. . .Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character . . .To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by District Courts is strictly original."

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) at 415-16. In accord, Atlantic CoastLine Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1969); Thistlethwaite v.

City of New York, 497 F. 2d 339 (2nd Cir.), cert. denied 419 U.S. 1093 (1974); Brown v. Chastain, 416 F. 2d 1012 (5th Cir.), cert. denied 397 U.S. 951 (1969); Deane Hill Country Club Inc. v. City of Knoxville, 379 F. 2d 321 (6th Cir.), cert. denied 389 U.S. 975 (1967).

CONCLUSION

THE DECISIONS OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

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January

Respectfully submitted,

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